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8 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**  
9 **OF THE STATE OF CALIFORNIA**  
10

11 In the Matter of the Claim of:

12 **Timothy Atkins**

**Proposed Decision**

**(Penal Code § 4900)**

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14  
15 **Introduction**

16 An in-person hearing on this claim for compensation as an erroneously convicted person was  
17 held on December 15-16, 2009, in Sacramento, California, by Kevin Kwong, Hearing Officer, California  
18 Victim Compensation and Government Claims Board. The claimant, Timothy Atkins, appeared at the  
19 hearing and was represented by Justin Brooks, Mario Conte, Alex Simpson, and Jeff Chinn from the  
20 California Innocence Project. The California Attorney General's Office was represented by Kenneth  
21 Sokoler and Gaiel Farris, Deputy Attorneys General (AG). The Board denied Atkins' claim on March  
22 18, 2010. On September 5, 2013, the Court of Appeals remanded this case back to the Board with the  
23 orders to conduct a new hearing and issue a new decision.

24 As explained below, Atkins has met the statutory requirements to receive compensation under  
25 Penal Code section 4900. He is entitled to \$713,700 for being incarcerated from July 28, 1987, until  
26 February 9, 2007.  
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## Procedural Background

On January 1, 1985, Vicente Gonzales and his wife Maria Gonzales were exiting their vehicle when they were approached by armed robbers. Vicente Gonzales was shot and killed and the perpetrators stole a necklace from Maria Gonzales. On January 7, 1985, the Los Angeles Police Department arrested Timothy Atkins and Ricky Evans for this crime. Atkins, who was 17-years-old at the time, was charged with murder and two counts of robbery.

Atkins was found guilty of all charges on July 28, 1987, and on February 5, 1988, he was sentenced to 32 years-to-life in prison. On March 6, 2006, Atkins filed a petition for a Writ of Habeas Corpus. An evidentiary hearing was held where, most notably, one witness recanted her prior testimony that implicated Atkins in the murder. On February 8, 2007, the Writ was granted, Atkins' convictions were vacated, and a new trial was ordered. The Los Angeles County District Attorney's Office declined to retry the case and Atkins was released from prison on February 9, 2007. Atkins submitted his claim to the Board under Penal Code section 4900 on August 9, 2007.

A hearing on Atkins' claim was held on December 15<sup>th</sup> and 16<sup>th</sup> in 2009. The Hearing Officer recommended that Atkins' claim be denied because he did not prove his innocence by a preponderance of the evidence. On March 18, 2010, the Board agreed with the Hearing Officer's conclusion to deny Atkins' claim. The Board, through verbal comments, made additional credibility determinations against Atkins and his witnesses that were not reflected in the Hearing Officer's proposed decision. Thus the proposed decision was not adopted by the Board; only the conclusion that Atkins did not meet his burden of proof was adopted.

Atkins filed a Writ of Mandate in the Los Angeles Superior Court. On March 5, 2012, the Superior Court ruled that there was substantial evidence to support the Board's decision to deny Atkins' claim and the Writ of Mandate was denied. Atkins appealed the Superior Court's decision to the Court of Appeals. On September 5, 2013, the Court of Appeals ordered the case remanded back to the Superior Court with the order that the Board hold a new hearing and render a written decision setting forth its factual and legal bases therefor. The Court of Appeals determined that there was not a sufficient written factual and legal basis for the Board's decision since it did not adopt the Hearing Officer's proposed decision. Oral findings by the Board were not a sufficient substitute. The Court of

1 Appeals did not address the issue of the sufficiency of the evidence to support the Board's decision  
2 to deny Atkins' claim.

3 On August 6, 2014, while the current matter was pending with the Board, Atkins filed a motion  
4 in the Superior Court of Los Angeles to receive a finding of factual innocence pursuant to Penal Code  
5 section 1485.55(b). This motion was opposed by the Los Angeles County District Attorney's Office.  
6 On August 22, 2014, the Superior Court granted Atkins' motion and he received a finding of factual  
7 innocence.

### 8 **Applicable Law**

9 The first issue that must be resolved in this case is whether Atkins' claim should be decided  
10 based on the changes in Penal Code section 4900, et al, that took effect on January 1, 2014, or the  
11 law as it existed at the time of the filing of the claim. Atkins originally submitted his claim pursuant to  
12 Penal Code section 4900 on August 9, 2007. On March 18, 2010, the Board voted to deny Atkins'  
13 claim. Atkins challenged this decision first in the Superior Court and then the Court of Appeals.  
14 Shortly after the Court of Appeals issued its decision to remand the case back to the Board, the  
15 statutes that govern claims filed under Penal Code section 4900 changed. These new statutes,  
16 including Penal Code section 1485.55(d), took effect on January 1, 2014. On August 22, 2014,  
17 Atkins received a finding of factual innocence by the Los Angeles Superior Court pursuant to Penal  
18 Code section 1485.55(b).

19 Penal Code section 1485.55(d) states: "If the court makes a finding that the petitioner has  
20 proven his or her innocence by a preponderance of the evidence pursuant to subdivision (b) or (c),  
21 the Board shall, without a hearing, recommend to the Legislature that an appropriation be made and  
22 the claim paid pursuant to Section 4904."

23 Prior to the change in law, a court's finding of factual innocence was a factor to consider in  
24 analyzing a claim pursuant to Penal Code section 4900, but it was not binding. Based on this new  
25 statute, Atkins argues that the Board must approve his claim without a hearing. Atkins argues that  
26 Penal Code section 1485.55(d) applies to his claim even though this statute did not exist at the time he  
27 submitted his application or when the Board made its original decision to deny his claim.

28 Atkins points to another claim for compensation under Penal Code section 4900 where the  
29 claimant filed prior to the change in law. The claim of Francisco Carrillo was received by the Board on

1 October 12, 2011, and decided by the Board on May 15, 2014. In its recommendation to the Board,  
2 the AG conceded that the new statutes apply. In its decision, the Board applied sections of the new  
3 law. Atkins asserts that even though 1485.55(d) did not apply in the Carrillo claim, the fact that the  
4 Board applied relevant sections of the new law shows that the Board believes that the new laws apply  
5 to claims filed prior to the change in law. Atkins argues that to not apply the new laws in this case  
6 would be inconsistent with a prior determination by the Board. Therefore, Atkins states, with a finding  
7 of factual innocence from a court, the Board must approve his claim and recommend payment to the  
8 Legislature.

9 The Attorney General argues that the Board cannot follow the new statute and automatically  
10 recommend payment to the legislature without a hearing. The AG states the order from the Court of  
11 Appeals commands that the Board "conduct a new hearing at which the Board, in the exercise of its  
12 discretion, may allow new evidence to be presented." The Board must conduct a new hearing and only  
13 has discretion in whether or not to allow new evidence. To not hold a hearing based on 1485.55(d)  
14 would mean that the Board is not following an order from the Court of Appeals.

15 Further, the AG argues the new statutes do not apply because no part of the penal code  
16 applies retroactively unless it's clearly expressed by the Legislature that retroactive application is  
17 intended. There is no retroactivity provision mentioned in 1485.55, or any of the other new sections  
18 of the laws.

19 The Hearing Officer finds that the Board is not required to apply the new laws pertaining to  
20 Penal Code section 4900 in this matter. In *People v. Ranger Ins. Co.* (1999) 76 Cal.App.4<sup>th</sup> 326, 330,  
21 the Court held that new penal code sections do not apply retroactively "unless expressly so  
22 declared." The California Supreme Court has held that in the absence of an express retroactivity  
23 provision, a statute will not be applied retroactively unless it is very clear that the Legislature intended  
24 such an application. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.)

25 Applying the new statutes would be tantamount to giving them a retroactive effect. Atkins  
26 submitted his claim in August of 2007. A two-day evidentiary hearing was held in December 2009.  
27 The Board made its original decision on the claim in March 2010. All these decisions were made  
28 years before the new statutes ever existed. Additionally, the Court of Appeals determined that there  
29 was not a sufficient written factual and legal basis for the Board's decision in 2010 since it did not

1 adopt the Hearing Officer's proposed decision. The return of this matter by the appellate court was  
2 based on a technicality regarding the Board's decision and the Hearing Officer's proposed decision.  
3 Therefore it is reasonable to apply the same law that existed at the time of the hearing and the  
4 decision.

5 The fact that the Board applied the new statutory scheme retroactively once does not make  
6 that decision binding. Furthermore, in the claim of Francisco Carrillo, the Board had not yet heard  
7 the matter nor had it made a decision in the case prior to the change of the law. Here, as previously  
8 noted, the Board had already heard and decided the matter prior to the change in the law.

9 Even if the Board chooses to apply the new laws retroactively, it cannot apply the specifics of  
10 Penal Code section 1455.55(d) in this matter. The order from the Court of Appeals is in direct  
11 conflict with the new code section. The Court ordered the Board to conduct a new hearing and  
12 consider the evidence while Penal Code section 1455.55(d) states that the Board cannot conduct a  
13 hearing and must recommend approval of the claim. The Court order preceded the change in the  
14 law and there was no provision in the new statutes that stated it supersedes an outstanding court  
15 order. Nor has the Court of Appeals modified its order in light of the new statutory scheme.  
16 Therefore, the Board must conduct a hearing on this claim because failure to do so would be in  
17 violation of the specific order from the Court of Appeals.<sup>1</sup>

18 This proposed decision is based on the law that was current when the Board made its  
19 decision on March 18, 2010.

## 20 **Summary of Evidence**

### 21 **The Prosecution's Evidence at Trial**

22 Shortly after midnight on January 1, 1985, Vicente and Maria Gonzales left a New Year's Eve  
23 concert held at the Los Angeles Convention Center. Around 1:00 a.m., the Gonzales' arrived at 335  
24 Brooks Ave. in Venice, CA,<sup>2</sup> to pick up their children who were with relatives. As they were about to  
25 step out of their vehicle, Evans approached Vicente from the driver's side with a shotgun and Atkins  
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27 <sup>1</sup> If a hearing was deemed necessary, both sides agreed to have a hearing on the written record based  
28 on the evidence already presented, as well as any new evidence that they chose to submit.

29 <sup>2</sup> All future street addresses are in Venice, CA.

1 approached Maria from behind on the passenger side with a handgun. Atkins placed one of his  
2 hands on Maria's face and his other hand was holding his weapon to her head. Evans then shot and  
3 killed Vicente while Atkins demanded money from Maria. Since Maria did not have her purse with  
4 her, Atkins grabbed the necklace off her neck, held it up to Evans and said "look, look," before the  
5 two ran away. The police arrested both Atkins and Evans six days later, and evidence was  
6 presented that Atkins attempted to flee the police during the course of his arrest.

7 Atkins and Evans were both documented gang members at the time of their arrest. While in  
8 jail and awaiting trial, fellow jailed gang members believed that one of them were "snitching" and  
9 ordered them to fight each other. When the gang was not satisfied with their fight, they began  
10 beating both Atkins and Evans. Evans died as a result of the beating while Atkins suffered serious  
11 injuries.

12 The following testimony was presented by the prosecution:

13 Denise Powell

14 The police learned that Powell might have information on robberies that were occurring in the  
15 neighborhood. Powell was very reluctant to speak to the police. She said many times during the  
16 questioning that she did not want to be involved and that she did not want to testify. She also spoke  
17 about retribution or retaliation, seemingly for any information that she might give to the police. The  
18 police told her that if she were called to testify and if she refused to answer questions, then she  
19 would be arrested for contempt.

20 Eventually, Powell implicated Atkins and Evans for the murder. According to her preliminary  
21 hearing testimony, Powell was a passenger in a vehicle driven by Tommy Yates. The two were  
22 driving around Venice looking for cocaine at around 8:00 a.m. on January 1, 1985. At this time, they  
23 encountered Atkins and Evans on the streets. Atkins and Evans were also looking to buy cocaine so  
24 they entered the backseat of the car. About a minute into the ride, the discussion turned to police  
25 activity and Atkins asked Yates if he had heard about the "Mexican who got killed the night before."  
26 Yates said that he did not hear about the murder and Atkins stated "we offed him." Powell  
27 understood "we offed him" to mean that Atkins killed him. Evans did not say anything about the  
28 crime and there was no further discussion of any crime related events. After driving around for about  
29 10 minutes, the parties did not find any cocaine and Atkins and Evans were dropped off.

1 Powell disappeared before Atkins' criminal trial and could not be located. The trial court  
2 determined that all reasonable efforts were made to locate Powell and her preliminary hearing  
3 testimony was allowed to be read at trial.

4 Marvin Moore

5 At the time of his declaration and testimony, Moore was imprisoned in County Jail. In July  
6 1985, Moore signed each page of a declaration that stated the following. At about 5:00 a.m. on  
7 January 1, 1985, Atkins and Evans ran to the back door of his home and stated that they needed a  
8 place to stay. Evans stated that "we just blasted a mother fucker." Evans also had dried blood on  
9 his right hand and forearm. Later that afternoon, Atkins came back to Moore's home and said that  
10 he thought that the police were looking for him.

11 Testimony from police officers stated that Moore, who a month prior to signing the declaration  
12 violated his parole by committing a robbery, was not promised anything nor did he ask for anything in  
13 return for his declaration. However, in consideration for his testimony at trial, Moore was going to  
14 receive a lesser sentence for his robbery charge.

15 Moore spoke to the police and the prosecutor on the day before he was to testify at Atkins'  
16 criminal trial. He only responded to a few questions and stated that his family had been threatened.  
17 At trial, Moore refused to answer many questions relating to his declaration. Significantly, he stated  
18 that none of his statements in his declaration were true and that he only made his declaration to  
19 receive a lesser sentence for his robbery charge. Moore refused to answer questions at trial  
20 regarding whether or not he was afraid to testify. He did acknowledge that the night before he spoke  
21 to the prosecutor where he discussed being threatened.

22 Maria Gonzales

23 Gonzales spoke to the police and testified at trial through a Spanish interpreter. Two days  
24 after Vicente's murder, Gonzales was shown two photo six-packs, one at a time. When she viewed  
25 the first six-pack, she became visibly broken-up and upset. She then identified Atkins as the one  
26 who robbed her. Gonzales then viewed the second six-pack, became emotional again, and picked  
27 out Evans as the person who shot Vicente. At trial, Gonzales identified Atkins as the person who  
28 stole her necklace.

1 On cross-examination, the defense raised numerous questions regarding the reliability of  
2 Gonzales' identification of Atkins as the perpetrator. First, Gonzales described the man with the gun  
3 to her head as a little over five feet tall and weighing between 135-145 pounds. Both of these  
4 attributes did not match Atkins' physical description because, at the time of the crime, Atkins was  
5 approximately six feet tall and weighed 175 pounds. Second, the defense questioned if Gonzales  
6 ever really got a good view of the perpetrator because Gonzales testified that she only saw the face  
7 of the person who took her necklace for about a second, during the time that the perpetrator said  
8 "look, look" as he held up her necklace. Third, Gonzales' description of the perpetrator having a thin,  
9 gaunt face with a two-inch, natural haircut did not match Atkins' features. Finally, the six-pack that  
10 Gonzales viewed contained a picture of Atkins when he was 14-years-old. At the time of the crime,  
11 Atkins was 17-years-old.

#### 12 Atkins' Defense Evidence at Trial

##### 13 Tommy Yates

14 At the time of the trial, Yates was serving a prison sentence for cocaine possession. He also  
15 had a previous conviction for cocaine possession and a burglary. He testified that he was driving a  
16 vehicle with Powell as the passenger. After picking up Atkins and Evans, Atkins did not admit to  
17 killing anybody. Atkins only said that the police were around and that it was because somebody had  
18 been killed.

##### 19 Kelly Lane Simpson

20 Simpson was Denise Powell's neighbor and testified that she talked with Powell on January 2,  
21 1985, about Powell's knowledge of muggings and robberies occurring in the neighborhood. Powell  
22 told Simpson that the other night she was at a party and heard Buster Young and Dunna Burns  
23 bragging about killing somebody near 4<sup>th</sup> and Brooks. Simpson testified that she was never told by  
24 Powell that Atkins committed the murder.

##### 25 Larry Pitre

26 Pitre, who was in jail at the time of trial, testified that he spoke to Moore while in a holding cell  
27 at the courthouse. Moore told him that he got out of jail by making a deal with the police in the Atkins  
28 case. Pitre testified that Moore told him that he lied to the police in the Atkins case and that two  
29 other people were responsible for the murder.



1 Julie Davis

2 At the time of the trial, Davis was dating Lee Dewberry, Atkins' uncle, and was imprisoned in  
3 county jail. She testified that shortly before midnight on December 31, 1984, she saw Atkins  
4 standing outside her sister's home holding a small stereo. Just after midnight, she and Atkins walked  
5 to the Fourth and Brooks crime scene because they heard that a murder had occurred.

6 Laura Boney

7 Boney was Atkins' grandmother and testified that she believes that Atkins returned home  
8 around 12:30 a.m. to 1:00 a.m. on the morning of January 1, 1985. She did not see Atkins but heard  
9 his voice.

10 Debbie Dresser

11 Dresser was a police detective who worked on the murder case. Sylvester Gus Henderson  
12 was a suspect in other robbery cases and had been confronted by Dresser on three prior occasions,  
13 but was unable to be apprehended in all three situations. Dresser believed that the description of the  
14 suspect in the Gonzales murder matched Henderson's description. Henderson was subsequently  
15 killed when he resisted arrest.

16 Other Evidence That Was Not Presented At Trial

17 After Atkins' arrest, the following individuals spoke to police detective Roger Niles. Neither a  
18 transcript, recording, nor other official report of these interviews was submitted at any proceeding.  
19 However, Niles took notes of these interviews and the following is a summary of Niles' notes.

20 Atkins' statement to the police

21 Atkins stated that he was in the laundry room at 410 Indiana Avenue<sup>3</sup> trying to sell a stolen  
22 car stereo so he could buy cocaine. While there, he saw three guys running down the alley behind  
23 the building. Cecil Bowens was the first man and he was carrying a shotgun in his hands. The  
24 second man was Ricky Powell<sup>4</sup> and he was carrying a .38 caliber handgun. Powell told Atkins that  
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27 <sup>3</sup> According to Google Maps, this address is approximately one tenth of a mile from the murder scene.

28 <sup>4</sup> No evidence was presented of a blood or family relationship between Denise Powell and Ricky  
29 Powell.

1 he better go home because "we just did a move."<sup>5</sup> Atkins was unsure who the third individual was,  
2 but he had a wallet in his hands. Atkins said that he left and went home, but when he returned the  
3 next day he saw a women's purse in the laundry room.

4 Atkins stated that he was with Ricky Evans for most of the night except between 12:30 a.m.  
5 and 2:00 a.m. Atkins left Evans during this period so that he could sell the car stereo. At the end of  
6 the interview, Atkins states that Evans was the third suspect who was carrying the wallet.

7 Ricky Evans' statement to the police

8 Evans told the police that he went to a New Year's Eve party on 7<sup>th</sup> and Broadway Street at  
9 approximately 10:30 p.m. or 11:00 p.m. He first told the police that he stayed at this party until 5:00  
10 p.m. on New Year's Day. He then said that he stayed at the party until 5:00 a.m. on New Year's Day.  
11 At the party, Evans first said that he only knew one person there but later said that Atkins and Atkins'  
12 sister were present. Evans laughed when asked if he committed the murder.

13 Inmate A.'s statement to the police

14 Inmate A. is a prisoner whose name was not disclosed due to concerns about his safety. On  
15 February 19, 1985, Inmate A. told the police that he spoke to Atkins while they were waiting to be  
16 transported to court on February 13, 1985, which was the date of Atkins' preliminary hearing. Atkins  
17 told Inmate A. that on New Year's Eve he needed money to buy cocaine and that he and Ricky  
18 Evans robbed a Mexican man and woman on Brooks Avenue. They stole the woman's necklace and  
19 shot the man. Atkins stated that he held the shotgun and that Evans held the handgun. Inmate A.  
20 also spoke to Atkins the following day, and Atkins told him that a female testified at the preliminary  
21 hearing that she heard Atkins talking about the shooting.

22 Inmate A. refused to testify at trial because the prosecution would not reduce his sentence in  
23 exchange for his testimony.

24 Lee Dewberry's statement to the police

25 Lee Dewberry is Atkins' uncle and he spoke to the police on May 13, 1985. He was in jail at  
26 the time of the interview but stated that he had seen Atkins off and on during New Year's Eve. He  
27 was reluctant to answer many questions but stated that he saw Atkins with a stereo and a necklace  
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29 <sup>5</sup> The quote appears in Niles' notes of the interview.

1 at some point on either December 31, 1984, or January 1, 1985. At trial, this information was not  
2 disclosed during Dewberry's direct examination and the court did not allow this information to be  
3 raised during rebuttal.

#### 4 Atkins' Habeas Corpus Hearing

5 On March 6, 2006, Atkins filed a Writ of Habeas Corpus.<sup>6</sup> His Writ was primarily based upon  
6 new evidence from Denise Powell, who appeared in-person to testify at this hearing.

#### 7 Denise Powell

8 Before Powell testified at the Habeas hearing, she was required to speak with an attorney  
9 appointed by the court regarding the crime of perjury since she was going to contradict her prior  
10 preliminary hearing testimony implicating Atkins. Powell agreed to testify regardless of any future  
11 legal implications.

12 Powell had spent eight to ten of the prior 20 years in prison for prostitution and drug crimes.  
13 She grew up and has lived in Venice for her entire life and was close with Atkins' family. She also  
14 testified that she considered Atkins to be a friend and that she had no reason to cause him trouble.

15 Powell testified that she did not know who committed the robberies in the neighborhood. She  
16 only told Simpson that she knew the perpetrators because she wanted to brag and look tough.  
17 When she was brought into the police station for questioning a few days after the murder she felt  
18 scared and wanted to go home. However, Detective Niles told her that she would not be able to go  
19 home until she provided the information to the police. The police threatened to charge her as an  
20 accessory if she did not disclose the information. The police said they only wanted to know the  
21 names of the perpetrators and that she would not have to testify about her knowledge of the crime.

22 Powell testified that she lied to the police when she told them that Atkins and Evans were  
23 responsible for the murder. While it was true that Atkins and Evans entered the vehicle to ride  
24 around and look for cocaine, Atkins never said "we offed him" when he asked Yates if he had heard  
25 about the murder. Powell stated that she implicated Atkins and Evans because they were fresh in  
26 her mind from being in the car a few days earlier and that she thought the police investigation would  
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29 <sup>6</sup> The judge who presided over the Habeas hearing was the same judge who presided over the criminal  
trial and later the factual innocence proceeding.

1 eventually show that Atkins and Evans did not commit the crime. At the preliminary hearing, Powell  
2 continued with her fabricated story because she was already "in it so deep."

3 In the late 1980's, Powell wrote a letter to Atkins' mother and a letter to his father stating that  
4 her preliminary hearing testimony was a lie. In 2005, Powell wrote an apology letter to Atkins.  
5 Powell also tried to deliver a letter to Atkins' criminal defense attorney but was unsuccessful because  
6 he had since been appointed as a Los Angeles Superior Court judge. Powell stated that she was  
7 coming forward now because she believed Atkins is innocent and she felt bad about what she had  
8 done. Powell also stated that she was available at the time of the criminal trial but was never  
9 contacted by the prosecution after her preliminary testimony hearing.

#### 10 Roger Niles

11 In rebuttal to Powell's testimony, Niles testified that he never threatened to charge Powell as  
12 an accessory and never told her that she would not have to testify. Niles also stated that he was  
13 unable to locate Powell after her preliminary hearing testimony.

#### 14 The Habeas Ruling

15 In granting Atkins' Habeas petition and ordering a new trial, the court believed Powell's  
16 testimony that she lied at the preliminary hearing and that her testimony at the Habeas hearing was  
17 truthful. The court stated that Powell's Habeas testimony was corroborated by the criminal trial  
18 testimony from Simpson and Yates. The court also questioned its prior ruling allowing Powell's  
19 preliminary hearing testimony to be admitted at the criminal trial because the prosecution probably  
20 could had done more to monitor Powell to ensure her availability for the criminal trial since Powell  
21 was clearly reluctant to testify since her first interview with the police.

22 The court found Powell's preliminary hearing testimony to be a significant factor in the jury's  
23 conviction of Atkins. Had Powell testified at the criminal trial, the court stated that in all probability a  
24 jury would have determined that Powell was lying. Without the evidence of Atkins saying "we offed  
25 him," Atkins would not have been convicted. The court gave no credibility to Marvin Moore's  
26 statements and stated that Maria Gonzales' eyewitness identification was highly questionable due to  
27 her inconsistencies and because Atkins' physical attributes significantly differed from Gonzales'  
28 identification.

1 Penal Code Section 4900 Hearing

2 On December 15<sup>th</sup> and 16<sup>th</sup> in 2009, a hearing was held to determine if Atkins was eligible for  
3 compensation under Penal Code Section 4900. The following witnesses were presented.

4 Dr. Mitchell Eisen

5 Dr. Eisen is an expert in the field of eye-witness identification. He testified about some of the  
6 reasons why eye witness identification has a low level of reliability. Cross racial identification, stress  
7 forced upon a victim from the presence of a weapon, and the passage of time are some of the  
8 factors that can lead to inaccurate identifications.

9 Repeated identifications can also lead to inaccuracy. Each time that a witness speaks about  
10 the identification, that identification becomes part of the witnesses' new memory. Thus, for each new  
11 reporting, the witness is not necessarily reporting on their initial perception during the crime, they are  
12 instead recollecting their most recent identification memory. This is one of the reasons why  
13 identifications can change over time. Overall, witnesses remember the big picture or specific  
14 features, and look to fill in the gaps through inferences that can change over time.

15 Finally, Dr. Eisen cautioned that confidence in an identification does not equal accuracy in the  
16 identification. A witness will generally become more confident in their identification over time,  
17 especially when they are told or given other forms of assurance that they made the correct  
18 identification.

19 Dr. Eisen testified that he never interviewed Maria Gonzales nor did he view the police six-  
20 packs that were shown to Gonzales when she picked out Atkins and Evans as the perpetrators.

21 Timothy Atkins

22 Atkins testified that on December 31, 1984, he left his home at around 5:00 p.m. to 6:00 p.m.  
23 to go to 5<sup>th</sup> and Broadway Street.<sup>7</sup> This was the area that he, his friends, and fellow gang members  
24 including Evans used to hang out. His purpose for the night was to "get high" and not to celebrate  
25 the New Year. After a few hours at 5<sup>th</sup> and Broadway, Atkins broke into a car and stole its stereo so  
26 that he could sell it to buy drugs.

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28  
29 <sup>7</sup> According to Google Maps, this site is approximately two tenths of a mile from the murder scene.

1 Atkins gave the stereo to a friend named Billy Clark and asked him if he wanted to buy it or if  
2 he could sell it. Clark took the stereo to try and sell it. Atkins told Clark how much he wanted for the  
3 stereo and then waited in a basement hallway in a building at 410 Indiana Avenue for many hours.  
4 From this hallway he had a view of the alley behind the building. He saw three individuals running  
5 through the alley. He recognized two of these individuals as fellow gang members Cecil Bowens and  
6 Ricky Powell. Atkins did not know the third individual. Powell then told Atkins that he better leave  
7 because "they had just done a move." Atkins understood this saying to mean that the men had just  
8 done something wrong but he was unsure of what they did. He believes that the men ran into the  
9 wash house after going through the alley.

10 Atkins did not leave the 410 Indiana location because he did not do anything wrong and  
11 because he wanted his money from the stereo. He could not remember if he received the money,  
12 but Atkins said that it would not be like him to not get his money. Later, he saw Julie Davis outside in  
13 the alley and heard a lot of sirens around the corner. The two walked together to the area and, from  
14 about one block away, Atkins could see the area roped off and a dead person hanging out of the car.  
15 Atkins spent approximately 25 minutes witnessing the crime scene.

16 Atkins returned to 5<sup>th</sup> and Broadway because he was still looking for drugs. Here he met up  
17 again with Evans. Yates then pulled up in a vehicle with Powell in the passenger seat. Yates was in  
18 his late 30's, was a friend of Atkins' mother, and Atkins had known him all his life. Atkins had never  
19 met Powell, but he knew of her through Powell's brother, and also because Atkins' mother was  
20 friends with her. Atkins and Evans sat in the back seat and there was no conversation in the car  
21 about being involved in any murder.

22 At the time of his arrest, Atkins was on probation for prior convictions of stealing a car stereo  
23 and receiving stolen goods. Atkins testified that he was violating his probation because he was not  
24 going to school. Although he tried to avoid police because he was violating probation, he did not run  
25 when the police came to arrest him for murder.

26 Although he might have told the police that Evans was the third guy he saw running down the  
27 alley, Atkins testified that he was sure that Evans was not the third guy. During the police interview  
28 Atkins was pressured, scared, yelled at, and grabbed. He believes he said Evans' name because the  
29 police wanted a name. Atkins denied being at a New Year's Eve party with Evans and said he only

1 saw him at 5<sup>th</sup> and Broadway before and after he sold the stereo. Atkins testified that he is no longer  
2 a gang member and currently works with youths to prevent them from joining gangs.

3 Roger Niles

4 Niles testified that he created two separate photo six-packs for Maria Gonzales to view.  
5 Before she viewed the six-packs she read and signed the standard admonishments about photo  
6 lineups. Gonzales identified both Atkins and Evans in the six-packs.

7 Declaration of Judge David Wesley

8 At the hearing, Atkins submitted a declaration from Judge David Wesley, who was his criminal  
9 defense attorney prior to becoming a judge at the Los Angeles County Superior Court. Judge  
10 Wesley stated in his declaration that he believed that Atkins was innocent of the crimes for which he  
11 was convicted.

12 Declaration of Lee Dewberry

13 At the hearing, Atkins submitted a declaration from Lee Dewberry stating that he never saw  
14 Atkins with a necklace on New Years Eve 1984.

15 The following arguments were submitted at the 4900 hearing:

16 Atkins' Arguments

17 During the hearing, Atkins made the following arguments to support the finding that he did not  
18 commit the crimes for which he was charged.

- 19 • Powell recanted her prior testimony implicating Atkins, and the recantation was determined to  
20 be credible by the Habeas court. Thus, there are no credible witnesses implicating Atkins to  
21 the murder. Moore testified that his declaration was a lie and that he only implicated Atkins to  
22 receive a deal from the prosecution. Pitre confirmed Moore's testimony that he lied to make a  
23 deal. Inmate A.'s declaration should not be given any consideration because he is an  
24 unnamed person who did not testify at any proceeding and never was subjected to cross-  
25 examination. Additionally, some of the details he gave of the murder were wrong.
- 26 • Powell's truthful testimony at the Habeas hearing, Yates' testimony at the criminal trial, and  
27 Atkins' testimony at the 4900 hearing are all similar and corroborate each other, thus they are  
28 reliable statements.

- Marla Gonzales' eye witness identification is unreliable. In addition to all the unreliability factors cited by Dr. Eisen, Gonzales testified that the perpetrator was a little over five feet tall and weighed 135 to 145 pounds. This physical description is not close to matching the physical description of the six foot tall, 175 pound Atkins. Gonzales only caught a short glimpse of the man's face, which lasted for about one second during the time that he said "look, look." She also described the perpetrator's face as thin and gaunt and that does not match Atkins' face. Finally, the Habeas court found Gonzales' identification unreliable.
- Atkins testimony at the 4900 hearing is credible. It would not make sense for Atkins to use as an alibi that he was committing a different crime only one block away from the murder when it occurred. Most suspects who create a false alibi place themselves far away from the crime scene and do not admit to committing a crime. Additionally, if Atkins was the perpetrator, it does not make sense for him to go back to the murder scene and watch the police activity for 25 minutes.

#### The AG's Arguments

The AG offered the following arguments to support the finding that Atkins has not proven by a preponderance of the evidence that he is innocent of the crime with which he was charged.

- Gonzales identified Atkins as the perpetrator and she has not recanted. Gonzales was visibly broken up and upset when she saw Atkins picture in the six-pack. She immediately identified Atkins as the perpetrator, and also identified him at the preliminary and criminal proceedings.
- Gonzales' physical description of the size of the perpetrator is not an issue. First, Gonzales was sitting in her car when the crime occurred and thus could not judge height accurately. Second, according to the LAPD "area broadcast" of the crime, one of the suspects was reported to be five feet six inches to five feet ten inches. This is a much closer description to Atkins' actual height. Finally, alleged suspects Bowens and Ricky Powell were both over five feet ten inches tall, thus even if Atkins' testimony were to be believed it would only prove that Gonzales was a bad judge of height.
- Gonzales' identification of both Atkins and Evans is also significant because those are the same two people implicated by Powell. It would be too large of a coincidence for Gonzales to



1 have mistakenly identified, in two separate six-packs, the same two individuals implicated by  
2 Powell.

- 3 • Powell's recantation of her preliminary hearing testimony is questionable. Powell had  
4 connections to Atkins' family and the Venice community. She made statements about being  
5 afraid of retaliation. Her Habeas testimony about the police interview was inconsistent with  
6 what actually happened during the police interview. Finally, Powell's Habeas testimony that  
7 she just gave the police a name and that she believed that the police would discover the truth  
8 is not credible. Powell told the police that she did not want to testify and there would be no  
9 reason to be concerned about testifying if she actually gave the police the name of an  
10 innocent person.
- 11 • Moore was threatened before trial and his declaration implicating Atkins is credible. In  
12 addition to telling the prosecutor that his family was threatened, there would be no reason for  
13 him to give information implicating Atkins in exchange for a lighter sentence, and then change  
14 his story at the very last moment.
- 15 • Inmate A.'s declaration is credible because it contains many correct details about the crime.  
16 Significantly, it contains details about Powell's testimony in the preliminary hearing that  
17 Inmate A. likely would not have known about unless he had actually spoken to Atkins.
- 18 • Atkins' alibi witnesses are not credible. Julie Davis stated that she and Atkins went to the  
19 murder scene just after midnight, but the crime did not occur until after 1:00 a.m. On New  
20 Year's Eve, a person would know the difference between midnight and 1:00 a.m. because of  
21 the festivities. Atkins also implicated Evans during his interview with the police when he said  
22 that Evans was the third man with Bowens and Powell. This contradicts Evans story that the  
23 two were at a party together, but more importantly supports Gonzales' eyewitness  
24 identification of Evans, which would then support her eyewitness identification of Atkins.

1 Atkins' Contribution to His Own Conviction<sup>8</sup>

2 The AG argued that Atkins contributed to his own conviction by fleeing from the police when  
3 the came to arrest him. By running, Atkins provided evidence of his consciousness of guilt and "a  
4 jury is entitled to infer consciousness of guilt from flight."<sup>9</sup>

5 Atkins stated that he was on probation at the time of his arrest and was in violation of his  
6 probation by not attending school. Thus, Atkins did not want to get caught violating his probation and  
7 tried to run from the police. Additionally, there is no evidence that the jury inferred any guilt from  
8 Atkins' flight, nor was any jury instruction given regarding allowable inferences from a suspect's flight  
9 from police. Finally, it is questionable if Atkins really did flee or attempt to flee from the police  
10 because police documents state that Atkins was arrested without incident.

11 New Evidence Received After Atkins' Successful Writ of Mandamus

12 On August 6, 2014, over seven years after his release from prison, Atkins filed a motion in the  
13 Superior Court of Los Angeles to receive a finding of factual innocence pursuant to Penal Code section  
14 1485.55(b). This motion was opposed by the Los Angeles County District Attorney's Office. On  
15 August 22, 2014, the court granted Atkins' motion and made a finding of factual innocence.  
16 The court's decision was based on Gonzales' testimony being unreliable, Moore's statements being  
17 unreliable, and Powell's recantation being credible.

18 **Determination of Issues**

19 A person erroneously convicted and imprisoned for a felony may submit a claim to the Board for  
20 pecuniary injury sustained as a result of his erroneous conviction and imprisonment.<sup>10</sup> Penal Code  
21 section 4903 provides that in order to state a successful claim for compensation, the claimant must  
22 prove the following by a preponderance of the evidence:<sup>11</sup>

23  
24 <sup>8</sup> Contributing to one's own arrest or conviction was eliminated from the Penal Code in 2013.

25 <sup>9</sup> *People v. Mason* (1991), 52 Cal.3d 909, 943.

26 <sup>10</sup> Pen. Code, § 4900.

27 <sup>11</sup> *Diola v. Board of Control* (1982) 135 Cal.App.3d 580, 588, fn 7; *Tennison v. Victim Compensation*  
28 *and Government Claims Board* (2000) 152 Cal. App. 4<sup>th</sup> 1164. Preponderance of the evidence means  
29 "evidence that has more convincing force than that opposed to it." (*People v. Miller* (1916) 171 Cal.  
649, 652.)

- 1        1. That the crime with which he was charged was either not committed at all, or, if committed,  
2            was not committed by him;
- 3        2. That he did not by any act or omission on his part, intentionally contribute to the bringing  
4            about of the arrest or conviction for the crime; and
- 5        3. That he sustained a pecuniary injury through his erroneous conviction and imprisonment.

6        If the claimant meets his burden of proof, the Board shall recommend to the legislature that an  
7        appropriation of \$100.00 per day of incarceration served subsequent to conviction be made for the  
8        claimant.<sup>12</sup> Here, Atkins has proven by a preponderance of the evidence that he did not commit the  
9        crimes with which he was charged.

10       At a recent court hearing, Atkins received a finding of factual innocence pursuant to Penal Code  
11       section 1495.55(b). During that proceeding, the court also determined that Powell's recantation was  
12       credible and that Moore's statements were not credible. Although Gonzales never testified in-person at  
13       the habeas hearing or the factual innocence proceeding, the court nonetheless determined that her  
14       testimony was highly questionable and unreliable. This is still a credibility determination because the  
15       court commented on the reliability of her testimony.

16       The testimony and evidence from Atkins, Gonzales, and Powell are the three most important  
17       pieces of evidence in this claim. The one piece of evidence that is the hardest for Atkins to overcome  
18       in a finding of innocence by this Board is the eye-witness testimony of Maria Gonzales. As the only  
19       surviving eye witness of her husband's murder, Gonzales testified at trial that Atkins was present and  
20       acting in concert with Ricky Evans who shot and killed her husband. Although her description of Atkins  
21       was considerably different in height and weight, she picked out both Atkins and Evans from a photo  
22       lineup soon after the murder and never wavered regarding who she saw kill her husband. When  
23       finding that Atkins was factually innocent, the Superior Court found Gonzales' identification to be  
24       unreliable. Although the Board is not bound by the court's findings, it is persuasive evidence of Atkins'  
25       innocence.

26  
27  
28       <sup>12</sup> Pen. Code, § 4904.  
29

1 Based on the court's findings, there is little evidence showing that Atkins committed the crime  
2 other than statements from Inmate A. and Dewberry. Their statements implicating Atkins lack the  
3 conviction and believability that Gonzales' testimony possessed. Comparatively, Atkins' innocence has  
4 become stronger with the court's credibility determinations and his receipt of a finding of factual  
5 innocence. Thus, there is a preponderance of the evidence that Atkins did not commit the crime.

6 Further, Atkins did not contribute to his own arrest or conviction. There is no evidence that  
7 flight was considered by the jury since a jury instruction was not given regarding allowable inferences  
8 from a suspect's flight from police. Additionally, Atkins could have fled from the police because he was  
9 currently violating his probation. Thus, it is determined that Atkins did not contribute to his own arrest  
10 or conviction.

11 Finally, Atkins has suffered a pecuniary loss. Due to his arrest he was unable to graduate high  
12 school. Upon his release from prison he had difficulty earning a degree and finding employment.  
13 Therefore Atkins claim for compensation should be approved and it is recommended the Legislature  
14 appropriate \$713,700 to the claimant pursuant to Penal Code section 4904.

15  
16 Dated: April 8, 2015

17 \_\_\_\_\_  
18 Kevin D. Kwong  
19 Hearing Officer  
20 California Victim Compensation and  
21 Government Claims Board  
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10 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**  
11 **OF THE STATE OF CALIFORNIA**  
12

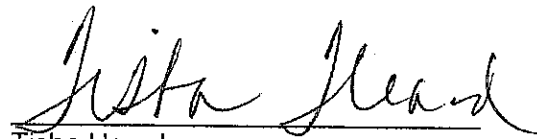
13 In the Matter of the Claim of:

**Notice of Decision**

14 **Susan Mellen**

15 On January 15, 2015, the California Victim Compensation and Government Claims Board  
16 adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced  
17 matter.

18  
19 Date: January 16, 2015

20   
21 Tisha Heard  
22 Board Liaison  
23 California Victim Compensation and  
24 Government Claims Board  
25  
26  
27  
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